No. 1243

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

HENRY WINTERS et al.,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANTS.

E. C. DAY,
JAMES A. WALSH,
Solicitors and of Counsel for Appellants.

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Reply Brief of Appellants.

In view of the fact that counsel for appellee has assumed in his brief, and emphasized in his oral argument the proposition that the common-law doctrine of riparian rights is still in force in Montana, we would respectfully ask leave of Court to submit a supplementary statement of the statutory enactments and decisions of the State and Territory with reference to the right to the use of water in Montana.

We have never, at any stage of these proceedings, conceded, for the purpose of argument or otherwise, that this doctrine has any application in Montana, but now reassert that the legislature of the Territory and State of Montana abrogated and abolished the common-law doctrine and made the right to the use of water depend entirely upon statutory appropriation. No case has been presented to the Supreme Court of Montana where the rights of either

of the parties were dependent upon riparian ownership of land, and the expressions of the Court, cited by counsel, in his brief, were used argumentatively or are *obiter dicta*. The distinction sought to be made by counsel between the laws of Montana and those of Idaho, Wyoming and Colorado does not in fact exist.

I.

That there may not be any question in the mind of the Court as to the statutory laws of the State and Territory, we beg leave to call your attention to the following, as a complete reprint of the statutes which have been enacted upon that subject.

The first law, approved January 12, 1865, was as follows:

An Act to Protect and Regulate the Irrigation of Land in Montana Territory.

Sec. 1. That all persons who claim, own or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river for the purpose of irrigation, and making said claim available to the full extent of the soil for agricultural purposes.

Sec. 2. That when any person owning claims in such locality has not sufficient length of area exposed to said stream in order to obtain a sufficient fall of water neces-

sary to irrigate his land, or that his farm or land used by him for agricultural purposes is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for the purposes as hereinbefore stated.

Sec. 3. That such right of way shall extend only to a ditch, dyke or cutting sufficient for the purposes required.

Sec. 4. That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion a certain amount of said water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all.

Sec. 5. That upon the refusal of owners of tracts of land or lands through which said ditch is proposed to run to allow of its passage through their property, it shall be proper for any justice of the peace, upon application being made, and proper notice being given to parties, as in other cases of litigation under the jurisdiction of a justice of the peace, to appoint three com-

missioners or reviewers, composed of disinterested claim holders within the townships, who shall proceed to view the premises, taking into consideration the necessities and rights of both parties, also the size of the cutting.

Sec. 6. That if the commissioners thus appointed shall think proper, they shall proceed to assess any damage which said ditch may cause to the owner of the lands through which it passes, taking also into consideration any advantages which he may derive from said ditch.

Sec. 7. That said assessment, upon its proper returns, sworn to and properly certified, the justice of the peace shall proceed to render his judgment, based upon the assessment of the commissioners, as he would do in any action of debt which may come under his jurisdiction, and subject to the like mode of execution and enforcement. In case the damage shall exceed the jurisdiction of the justice of the peace, the commissioners shall report to the probate judge of the county, who shall proceed in the same manner as required of the justice of the peace.

Sec. 8. That all persons on the margin, brink, neighborhood, or precinct of any stream of water, shall have the right and power to place upon the bank of said stream a wheel, or other machine, for the purpose of raising water to the level required for purposes of irrigation, and that the right of way shall not be refused by the owners of any tract of land upon which it is re-

quired, subject to the like regulation as required for ditches, and laid down in the preceding sections.

Sec. 9. That the said commissioners, as provided for in section five, shall be allowed two dollars each per day for their services.

Sec. 10. That the provisions of the sections of this act shall not conflict with any rights of mills or millmen, or interfere with any milldam, race, or watercourse which already exists.

Sec. 11. That the provisions of this act shall also entail upon the parties using water as provided above, the careful management and control of said water, that in their waste they shall not injure anyone, and if so injured, damages shall be assessed as hereinbefore provided.

Sec. 12. That this act to take effect from and after its passage.

Approved January 12, 1865.

Laws of Montana, 1864-1865, pp. 367-369.

This law remained in force until January 12, 1872, when a revision of the laws was made, and what is hereinafter quoted as section 1239 to section 1249, inclusive, was adopted, excepting the proviso contained in section 1239, which was adopted in 1879. See codified statutes 1871-72, pp. 498-500.

On February 16, 1877, sections 1263-1266, inclusive, hereinafter quoted were adopted. See Session Laws of 1877, pp. 406, 407.

On February 21, 1879, the proviso contained in section 1239 was added, and sections 1239 to 1249, inclusive, hereinafter quoted were adopted in the Revised Statutes. See Revised Statutes 1881, page 562. Sections 1263 to 1266, inclusive, seem to have been omitted in the Revision of 1881.

In 1887 the Statutes of Montana were again revised and the law therein relating to the appropriation of water is as follows:

Sec. 1239. Any person or persons, corporation or company, who may have or hold a title, or possessory right or title, to any agricultural lands within the limits of this Territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said Territory for the purposes of irrigation and making said land available for agricultural purposes to the full extent of the soil thereof: Provided, That in all cases where, by virtue of prior appropriation any person may have diverted all the water of any stream, or to such an extent that there shall not be an amount sufficient left therein for those having a subsequent right to the waters of such stream for such purpose of irrigation, and there shall at any time be a surplus of such water so diverted, over and above what is actually used for such purpose by such prior appropriator, such person shall be required to turn and cause to flow back into such stream such surplus water, and upon failure so to do, within five days after demand being made upon him

in writing by any person having a right to the use of such surplus water, such person, so diverting the same, shall be liable to the person aggrieved thereby in the sum of twenty-five dollars for each and every day, such water shall be withheld after such notice; to be recovered by civil action by any person having a right to the use of such surplus water.

Note.—Act February 21, 1879.

Sec. 1240. When any person or persons, corporation or company, owning or holding land as provided in section 1239 of this chapter, shall have no available water facilities upon the same, or whenever it may be necessary to raise the waters of said stream or creek to a sufficient height to so irrigate said land, or whenever such lands are too far removed from said stream to use the waters thereof as aforesaid, such person or persons, corporation or company, shall have the right of way through and over any tract or piece of land for the purposes of conducting and conveying said water by means of ditches, dikes, flumes, or canals, for the purpose aforesaid.

Sec. 1241. Such right to so dig and construct ditches, dikes, flumes and canals over and across the lands of another, shall only extend to so much digging, cutting or excavations as may be necessary for the purposes required.

Sec. 1242. In all controversies respecting the rights to water, under the provisions of this chapter, the same shall be determined by the date of the appropriation, as respectivly made by the parties.

Sec. 1243. The waters of the streams or creeks of the territory may be made available to the full extent of the capacity thereof for irrigating purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of the prior appropriator; but in no case shall the same be diverted or turned from the ditches or canals of such appropriator, so as to render the same unavailable.

Sec. 1244. Any person or persons, corporation or company, damaging or injuring the lands or possessions of another, by reason of cutting or digging ditches or canals, or erecting flumes, as provided by section 1240 of this chapter, the party so committing such injury or damage shall be liable to the party so injured therefor.

Sec. 1245. This chapter shall not be so construed as to impair or in any way or manner interfere with the rights of parties to the use of the water of such streams or creeks acquired before its passage.

Sec. 1246. This article shall not be so construed as to prevent or exclude the appropriators of the waters of the said streams or creeks for mining, manufacturing, or other beneficial purposes, and the right also to appropriate the same is hereby equally recognized and declared.

Sec. 1247. Any person or persons, corporation or company, who may dig and construct ditches, dikes, flumes or canals, over or across any public roads or highways, or who use the waters of such ditches, dikes, flumes or canals, shall be required to keep the same in good repair at such crossings or other places where the water from

any such ditches, dikes, flumes or canals may flow over, or in anywise injure any roads or highways, either by bridging or otherwise.

Sec. 1248. Any person or persons, offending against section 1247 of this chapter, on conviction thereof, shall forfeit and pay for every such offense a penalty of not less than twenty-five dollars, nor more than one hundred dollars to be recovered, with costs of suit, in civil action, in the name of the Territory of Montana, before any Court having jurisdiction; one-half of the fine so collected shall be paid into the county treasury for the benefit of the common schools of the county in which the offense was committed, and the other half shall be paid to the person or persons informing the nearest magistrate that such offense has been committed. All such fines and costs shall be collected without stay of execution, and such defendant or defendants may, by order of the Court, be confined in the county jail until such fine and costs shall have been paid.

Sec. 1249. In all controversies respecting the right to water in this territory, whether for mining, manufacturing, agricultural, or other useful purposes, the rights of the parties shall be determined by the dates of appropriation respectively, with the modifications heretofore existing under the local laws, rules, or customs and decisions of the Supreme Court of the territory.

Note.—Act of January 12, 1872. Comp. Stats. 1887, p. 993.

Sections 1250 to 1257, inclusive, of the Compiled Stat-

utes are found on pages 23 and 24 of our former brief, and are not here reprinted.

Sec. 1258. Persons who have heretofore acquired rights to the use of water shall, within six months after the publication of this act, file in the office of the recorder of the County in which the water right is situated a declaration in writing, except notice be already given of record as required by this act, the same facts as required in the notice provided for record in section 1255 of this chapter, such declaration shall be verified as required in section 1255 of this chapter, in cases of notice of appropriation of water: Provided, That a failure to comply with the requirements of this section may in nowise work a forfeiture of such heretofore acquired rights nor prevent any such claimant from establishing such rights in the courts.

Sec. 1259. The record provided for in sections 1255 and 1258 of this chapter, when duly made, shall be taken and received in all the courts of this territory as *prima facie* evidence of the statements therein contained.

Sec. 1260. In any suit hereafter commenced for the protection of rights acquired to water under the laws of this territory, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such actions, and the court may in one decree settle the relative priorities and rights of all the parties to such suit. When damages are claimed for the wrongful diversion of water in any such suit, the same may be assessed and apportioned by the jury in their verdicts, and

judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves.

In any action concerning joint water rights, or joint rights in water ditches, unless partition of the same is asked by the parties to the action, the courts shall hear and determine such controversy as if the same were several as well as joint.

Sec. 1261. The recorder of such county must keep a well-bound book, in which he must record the notices and declarations provided for in this act, and he shall be entitled to have and receive the same fees as are now or hereafter may be allowed by law for recording instruments entitled to be recorded.

Sec. 1262. The measurement of water appropriated under this chapter shall be conducted in the following manner: A box or flume shall be constructed with a headgate placed so as to leave an opening between the bottom of the box or flume and the lower edge of the headgate, with a slide to enter at one side of and of sufficient width to close the opening left by the headgate, by means of which the dimensions of the opening are to be adjusted. The box or flume shall be placed level and so arranged that the stream in passing through the aperture is not obstructed by back water or an eddy below the gate; but before entering the opening to be measured the stream shall be brought to an eddy, and shall stand three inches on the headgate and above the top of the opening. The num-

ber of square inches contained in the opening shall be the measure of inches of water.

Note.—Sections 1250-1262, Act of March 12, 1885.

Section 1263. That any person or persons, company or corporation, having the right to use, sell or dispose of water, and engaged in using, selling or disposing of the same, who shall have a surplus of water not used, or sold, or any person or persons, corporation or company, having a surplus of water, and the right to sell and dispose of the same, shall, and they or it are hereby required, upon the payment or tender to the person or persons entitled thereto, an amount equal to the usual and customary rates per inch, to convey and deliver to the person or persons, company or corporation, such surplus of unsold water, or so much thereof for which said payment or tender shall have been made, and shall continue so to convey and deliver the same weekly so long as said surplus of unused or unsold water shall exist and said payment or tender made as aforesaid.

Section 1264. Any person or persons, corporation or company, desiring to avail themselves of the provisions of this chapter, shall, at their own cost and expense, construct or dig the necessary flumes or ditches, to receive and convey the surplus water so desired by it or them, and shall pay or tender to the person or persons, corporation or company having the right to the use, sale or disposal thereof, an amount equal to the necessary costs and expense of tapping any gulch, stream, reservoir, ditch, flume or aqueduct, and putting in gates, gauges or other

proper and necessary appliances usual and customary in such cases and until the same shall be so done the delivery of the said surplus water shall not be required as provided by section 1263 of this chapter.

Section 1265. That any person or persons, corporation or company, constructing the necessary ditches, aqueducts or flumes and making the payments or tenders hereinbefore provided shall be entitled to the use of so much of the said surplus water as said ditches, flumes or aqueducts shall have the capacity to carry, and for which payment or tender shall have been made as aforesaid, with all the rights and privileges incidental thereto so long as said unsold or surplus water exists and said payment or tender shall be or have been made, and may institute and maintain any appropriate action at law or in equity for the enforcement of such right or recovery of damages arising from a failure to deliver or wrongful diversion of the same.

Section 1266. That nothing in this chapter shall be so construed as to give the person or persons, corporation or company, acquiring the right to the use of water as hereinbefore provided, the right to sell or dispose of the same after being so used by it or them, or prevent the original owner or proprietor from retaking, selling and disposing of the same in the usual and customary manner, after it is so used as aforesaid.

(Note.—Act of Feb. 16, 1877.)

In 1895 the laws of Montana were codified, taking effect July 1st, 1895. Sections 1250 to 1257, inclusive, quoted on pages 23 and 24 of our former brief, were adopted as

sections 1880, 1881, 1882, 1883, 1885, 1886, 1887 and 1888, respectively, of the Civil Code.

Sections 1258 to 1263, inclusive, heretofore quoted in this brief were adopted as sections 1889, 1890, 1891, 1892 and 1893, respectively, of the Civil Code.

The proviso contained in section 1239, *supra*, was adopted as section 1884 of the Civil Code.

These sections being heretofore quoted are not here reprinted.

In 1899, Session Laws, page 126, section 1893, was repealed, and the cubic foot per second made the standard of measurement.

Section 1880 was amended in 1901 to read as follows:

"The right to the use of any unappropriated water of any natural stream, watercourse, spring, dry coulie, or other natural source of supply and of any running water flowing in streams, rivers, canyons, and ravines of this State may hereafter be acquired by appropriation."

Session Laws, 1901, page 152.

Section 1894. The right to conduct water from or over the land of another for any beneficial use, includes the right to raise any water by means of dams, reservoirs or embankments to a sufficient height to make the same available for the use intended, and the right to any and all land necessary therefor may be acquired upon payment of just compensation in the manner provided by law for the taking of private property for pub-

lic use; provided further, that if it is necessary to conduct the water across the right of way of any railroad, it shall be the duty of the owners of the ditch or flume to give thirty days' notice in writing to the owner or owners of such railway of their intentions to construct a ditch or flume across the right of way of such railroad and the point at which the said ditch or flume will cross the railroad, also the time when the construction of said ditch or flume will be made. If the owner or owners of such railroad or their agent fails to appear and attend at the time and place fixed in said notice, it shall be lawful for the owner or owners of said flume or ditch to construct the same across the right of way of such railroad, without further notice to said owner or owners of the railroad.

(Section 1894 Act approved March 18, 1895.)

Section 1895. Any person who digs and constructs ditches, dikes, flumes or canals, over or across any public roads or highway, or who uses the water of such ditches, dikes, flumes or canals, is required to keep the same in good repair at such crossings or other places where the water from any such ditches, dikes, flumes or canals may flow over or in anywise injure any road or highway, either by bridging or otherwise.

Section 1896. Any person offending against the preceding section, on conviction thereof shall pay for every offense a fine of not less than twenty-five dollars, nor more than one hundred dollars, with costs of prosecution. One half of the fine shall be paid into the County

Treasury for the benefit of the common schools of the county in which the offense was committed and the other half shall be paid to the person informing the nearest magistrate that such offense has been committed, who shall issue a warrant upon proper complaint being made.

Sections 1897, 1898, 1899 and 1900 of the Civil Code are heretofore quoted from the Compiled Statutes of 1887 as sections 1263, 1264, 1265 and 1266, respectively, and are not here reprinted.

Sections 1901 and 1902 provide how dams and reservoirs shall be constructed.

In 1891 (Session Laws, p. 295), the legislature passed an act regulating the procedure in court to obtain the right of way to construct ditches on the lands of another. This is now embodied in the codes in the chapter relating to eminent domain.

In 1899 (Session Laws, p. 136) a law was passed, giving the courts authority to appoint commissioners to divide water between appropriators. Such commissioners are given authority to enter upon premises and to make arrests.

From the foregoing it will be seen that the first legislative assembly of the Territory enacted, and there has been in force ever since, a complete system of laws defining and regulating the manner in which water may be appropriated, and the rights of the respective appropriators determined, protected and enforced. Judge Knowles said in Thorpe vs. Freed, *infra,* that the law as first enacted

established the right to water by appropriation and abolished riparian rights. To remove whatever doubt may have existed hitherto, the legislature in 1872 amended section 1 of the law by striking out all of that portion of the section providing for the irrigation of land "on the margin, bank or in the neighborhood of any stream," and gave the right to appropriate to the fullest extent of the stream without regard to deterioration of quality or diminution of quantity, so long as the rights of prior appropriators were not affected. Riparian ownership was not recognized, but all rights were to be determined by the date of appropriation. First in time was first in right.

The right of appropriation, as given by these laws, is wholly inconsistent with the doctrine of riparian rights. Both cannot exist together. The words "appropriator," "appropriation of water" and "unappropriated" have a clear and well-defined meaning and recognized by Congress, the legislatures of the States, and the courts. The laws of the States, the decisions of the courts and the Act of 1877 refer to "unappropriated" water.

II.

Nor have our Courts recognized or acknowledged the doctrine of riparian rights. On the contrary, however, they have recognized and enforced to the fullest extent the right and doctrine of appropriation.

A decision of a Court to have any binding force or effect, or to have any weight as authority, or as a guide to or rule of action, must be upon the question

presented to the Court for determination and decision. The language of the opinion is only the personal views of the Judge. This is especially true where a Judge writes an opinion expressing his personal views on a particular question.

The case of Thorpe vs. Freed, 1 Mont. 651, upon which counsel for appellee relies, does not decide, or in any manner hold that the doctrine of riparian rights was enforced or recognized in the Territory of Montana. In that case were involved the rights of appropriators only. The question of riparian rights was not involved, nor was the decision of the Court in any way influenced by the doctrine of riparian rights.

Judge Murphy tried the case in the court below, and was disqualified to sit in the appellate court. Judge Knowles and Judge Wade, who were recently appointed to the position of judge in that court, expressed their personal views, in relation to the question of riparian rights, a question which was not involved in the case. They did agree upon the affirmance of the judgment of the lower court. That decision has never been cited by the courts of Montana as recognizing, acknowledging or establishing the doctrine of riparian rights.

In that case Judge Knowles said: "The question of whether or not a law is good for the people of our Territory is a matter for legislative and not judicial consideration. * * * If we were called upon to say what were the necessities of this country in regard to

the use of water for the purpose of irrigation, we would reply that there was a demand that water should be used for that purpose, and the considerations of the general welfare of the country, and the principles of natural equity, should guarantee to the prior appropriator of water for such use the first right to use the same to the extent of his necessities for domestic purposes, the quenching of the thirst of himself and animals and for agricultural purposes." * * *

"We hold, however, that the law that is a part of a system of laws, which our legislative assembly have adopted, cannot be annulled or varied by a court through any such considerations." * * *

"The plaintiffs must recover, if at all, upon their rights of appropriation. They have based their rights upon this and not as riparian proprietors." * * *

"Ever since the settlement of this territory, it has been the custom of those who settled upon any portion of the public domain, and devoted any part thereof to the purposes of agriculture, to dig ditches and to turn out the waters of some stream to be used to irrigate the same. This right has been universally recognized by our people." * * *

"In the second place, has this right been recognized by law?"

Here the Judge quotes section 1 of the Act of 1865, and then said: "This statute was in force at the time the plaintiffs made their appropriation of water, and

at the time the act of Congress (Act of 1866) above referred to became law." * * *

"This statute (Act of January 12, 1865), as far as it could established and recognized the right of appropriation of water for agricultural purposes." * * *

"As far as the legislative assembly of Montana had the power they repealed the common-law doctrine in regard to riparian proprietors."

He then discussed the subject of the recognition of these rights by the Courts and held that they are so recognized and said: "The right to appropriate water for the purpose of irrigation, in our opinion, has been acknowledged and recognized by the customs and laws and decisions of this territory. The law of Congress comes in and says that wherever, by priority of possession, the right to the use of water for these purposes has vested and accrued, the possessors and owners of such vested rights shall be maintained and protected in the same. This is, in effect, a grant to such parties of these rights."

"A grant cannot be divested by a subsequent grant. The words used in section 9 (Act of 1866) were, as I have said, in effect a grant. A grant made by law is as effectual as a grant made by deed or patent, and a subsequent grant of the land would be subject to any previous grant of water right. After a full consideration we are impelled to the conclusion that the right to appropriate water for the purpose of irrigation stands

upon as good, if not a better, footing as the right to appropriate water for mining purposes."

The judgment of the court below, recognizing the right of appropriation for agricultural purposes, was affirmed. Judge Wade concurred in the opinion by Judge Knowles, affirming the judgment of the lower court. He then commented on the provisions of the statute relating to the appropriation of water and the equity of dividing the water by commissioners as therein provided. But the Court below, however, held that that provision of the statute relating to the appointment of the commissioners was void because it conferred judicial power on commissioners.

Judge Wade presided as Chief Justice of the court until 1888 and in many subsequent decisions recognized the right of appropriation, and never recognized the doctrine of riparian rights.

The District Courts had prior to that case recognized the right to appropriate water. The Supreme Court also recognized that right.

Caruthers vs. Pemberton, 1 Mont. 111.

Harris vs. Schantz, 1 Mont. 212.

Columbia M. Co. vs. Holter, 1 Mont. 296.

Wollman vs. Garringer, 1 Mont. 535.

Atchison vs. Peterson, 1 Mont. 561.

In an unbroken line of decisions, the Supreme Court of Montana has recognized the right to appropriate water, and has never recognized or acknowledged the doctrine of riparian proprietorship or rights.

The case of Smith vs. Deniff, 24 Mont. 20, does not support the contention of counsel for the appellee. The Court in that case does not recognize or acknowledge riparian rights. The issue in that case was whether or not an appropriation of water, made by a person and used upon land to which he had no title, and the title to which land was thereafter acquired by another person became appurtenant to that land. The case is first reported in 23 Mont. 65. In the opinion there written, the Court held that the water right in such case became appurtenant to the land. The Court on its own motion granted a rehearing. The last opinion in 24 Mont. 20 was written by the same Judge who wrote the former opinion—Judge Pigott. All that was said by Judge Pigott outside of the issue as to whether or not the water right was appurtenant to the land when the owner of the water right had no title to the land is *obiter dictum.* However, when we examine and analyze the *dictum* of Judge Pigott, we find that he does not acknowledge or recognize riparian rights. On the contrary, he recognizes and acknowledges the right to appropriate water. The question which Judge Pigott in the *dictum*, embraced in the opinion, discussed is that a person may make an appropriation of water from a stream, if the appropriation is made upon public land or state lands, but that a person may not go upon lands of another to appropriate water of a stream unless he has permission to do so.

A person may not trespass upon the land of another to make an appropriation of water, or to construct a

ditch across his land, but he can obtain permission of the owner, or by proper condemnation proceedings acquire the right to go upon the land and make an appropriation or to construct a ditch to convey water.

In that case Judge Pigott said: "The right to appropriate water on the land of another for public use may be obtained through condemnation proceedings under the right of eminent domain."

He then referred to section 15 of article 3 of the Constitution of Montana, which is as follows:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use, and the right of way over lands of others for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith as sites for reservoirs necessary for collecting and storing the same shall be held to be a public use."

An act was passed, section 1894, heretofore quoted, which gives the right to conduct water *from* or over the land of another for any beneficial use.

The act of March 6, 1891, heretofore cited, which provided for condemnation of right of way for ditches was, under the provision of section 15, article 3, above quoted, held valid in Ellinghouse vs. Taylor, 19 Mont. 462.

The statute and the Court thus recognize the right to condemn land for the purpose of constructing reservoirs, ditches and making an appropriation of water.

The Supreme Court of the United States very early rec-

ognized the right to acquire the use of water in Montana by appropriation, and the abrogation of riparian rights.

In the case of Basey vs. Gallagher, 20 Wallace, page 670, the Court said:

"In the case of Atchison vs. Peterson, we had occasion to consider the respective rights of miners to running waters on the mineral lands of the public domain; and we there held that by the custom which had obtained among miners in the Pacific States and Territories, the party who first subjected the water to use, or took the necessary steps for that purpose, was regarded, except as against the government, as the source of title in all controversies respecting it; that the doctrines of the common law declaratory of the rights of riparian proprietors were inapplicable or applicable only to a limited extent, to the necessities of miners, and were inadequate to their protection; that the equality of right recognized by that law among all the proprietors upon the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream; that the Government, by its silent acquiescence, had assented to and encouraged the occupation of the public lands for mining; and that he who first connected his labor with property thus situated and open to general exploration, did in natural justice acquire a better right to its use and enjoyment than others who had not given that labor; that the miners on the public lands throughout the Pacific States and Territories by their cus-

toms, usages and regulations, had recognized the inherent justice of this principle, and the principle itself was at an early period recognized by legislation and enforced by the Courts in those States and Territories, and was finally approved by the legislation of Congress in 1866. The views there expressed and the rulings made are equally applicable to the use of water on the public lands for the purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the Courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."

This decision was made before the act of 1877, heretofore cited, was passed, and Congress by that act and by section 8 of the Act of 1903, the Reclamation Act, expressly disclaimed all right to the waters of the public domain.

These cases were appeals from the Supreme Court of Montana. The former was a mining case and the latter related to appropriations for agricultural purposes. Since the decisions of Atchison vs. Peterson and Basey vs. Gallagher, it has never been asserted or recognized in Montana that the doctrine of riparian rights does exist. No case has been presented to the Supreme Court in which the question of riparian rights was involved. The decision in Atchison vs. Peterson and Basey vs. Gallagher is binding upon this Court.

The case of Cruse vs. McCaully, 96 Fed. 369, is not applicable to the facts in this case, and while we have a

very high opinion of the learning and ability of Judge Knowles, his opinion is not binding upon this Court, nor can it be held as binding as a construction of the laws of Montana. On the contrary this Court is bound by the decisions of the Supreme Court of Montana construing the laws of that State. Furthermore the title in that case had passed from the Government, and in the case at bar the Government is still the owner of the land.

Mr. Kinney, upon whose authority counsel for appellee, seems to rely, after quoting and discussing the laws of Montana relating to water rights, says: "The statutes of Montana entirely ignore the rights of riparian proprietors. It is also to be noticed that from the very first the decisions of the Court are to the effect that rights to water can only be acquired by the appropriation of the same to some beneficial use or purpose, and that the common-law doctrine of riparian rights is not recognized or protected by the Courts." (Kinney on Irrigation, sec. 554.)

The Government of the United States has given to its citizens the right to go upon public domain and the right to appropriate and divert water for beneficial purposes.

This grant was given without modification or restriction. No officer of any department is given authority to suspend or modify the operation of that grant. While the land is the property of the Government the people have the right to go upon the land, divert and appropriate water and apply it to beneficial use. Does the grantor of the Government take title subject to this grant?

We have not found any decision of the Supreme Court

of the United States in which this particular question was decided since the adoption of the law recognizing the right to appropriate water, and from a state where riparian rights are not recognized.

The case of Sturr vs. Beck, 133 U. S. 541, was an appeal from the Supreme Court of the Territory of Dakota, in which the doctrine of riparian rights was clearly recognized by statute, as follows:

"The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue or pollute the same." Levisee's Dakota Codes, 2d ed., sec. 255, Civil Code.

III.

Counsel attempts to draw a distinction between the laws of Montana and the laws of Wyoming, Idaho and Colorado, and contends that because of such distinction, the decision of this court in the case of Krall vs. United States, 79 Fed. 241, is not applicable. There is no distinction between the laws of Idaho and Montana relating to the appropriation of water. Section 2582 of the Statutes of Idaho is the same as section 1885 of the Civil Code of Montana. Section 2580 of Idaho is substantially the same as section 1880 of Montana.

The provisions of the statutes of the other States do not give the State and citizens of the States any greater right than is given by the laws of Montana. The Government of the United States has granted them the right to go upon the public domain and appropriate water according to the local rules, customs and the decisions of its Courts. Recognizing that right, the laws of Montana provide how appropriation of water may be made and the rights of the respective appropriators determined.

The right to appropriate water on the public domain is given to the individual and not to the State or Territory, and the State or Territory cannot appropriate that which it does not own. The only right it can give upon the public domain is one that is already recognized and expressly given by the Government of the United States. The State cannot by its statute arrogate to itself the proprietorship of lands or water owned by the Government of the United States or interfere with the disposition thereof, or declare that these waters are the property of the State or public.

The recognition by the laws of the State of the right to appropriate water in accordance with the grant given by the United States, and the enactment of laws defining the manner in which appropriations shall be made was a legitimate exercise of the legislative powers, provided it does not interfere with the disposition of the public domain or the waters thereon.

The local rules, customs and decisions of the Courts and legislative enactments relating to water rights on the public domain are subservient to the powers of Con-

gress, and these laws, regulations and decisions were recognized by Congress in the Act of 1866, section 2339, Revised Statutes, and the Act of 1877 as amended by the Act of 1891.

The recognition of this right is analogous to the right to make laws relating to the location of mining claims.

Butte City Water Co. vs. Baker, 196 U. S. 119.
Erhardt vs. Boaro, 113 U. S. 527.
Kendall vs. S. J. S. M. Co., 144 U. S. 658.
Nothmore vs. Simmons, 97 Fed. 386.

This right is again expressly recognized in the Act of Congress, the Reclamation Act, 32 Statutes at Large, p. 390. Section 8 of that act is as follows:

Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State, or of the Federal Government, or any land owner, appropriator, or user of water in, to or from any interstate stream or the waters thereof; Provided that the right to use the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

None of the Courts of the Pacific States recognize or acknowledge the doctrine of riparian rights, except California. The Civil Code of California, adopted in 1872, made provision for the appropriation of water.

That concluded act is as follows:

Sec. 1422. The rights of riparian proprietors are not affected by the provisions of this article.

IV.

It is contended by counsel that the waters upon the lands in question were never open to appropriation, that they were never a part of the public lands. Section 3 of the act ratifying the treaty with the Indians expressly threw them open to settlement as public lands. See that section, quoted in full on page 35 of our former brief.

Section 2339, heretofore cited, recognizes the right to appropriate water on public domain. The Act of 1877 as amended by the Act of 1891, heretofore quoted, in express terms gives the right. Section 8 of the Act of 1903, last quoted, disclaims all claim to the waters on the public domain. Section 3 of the Act ratifying the treaty, heretofore cited, declares that these lands are a part of the public domain, thus placing them on the same footing as all other public lands, subject to the same grants.

It is stated by counsel for the appellee that the rights of the Government here to be determined are those incident to and growing out of the ownership of lands, held and used by it in the character of a private or proprietary

owner of a tract of land bordering on a stream, and set apart and appropriated for a particular purpose. (Page 14, appellee's brief.) We therefore find that the Government is in the position of an owner who has theretofore granted to the public the right to go upon its land and divert and appropriate water for a beneficial purpose.

We respectfully submit that there is nothing in the statutes of the State, or the decision of its Courts, or the decisions of the Courts of the United States, or the customs of the country, which will support counsel in his contention that the Government is entitled to the waters of Milk river by reason of its riparian ownership of the lands described in the bill of complaint.

Respectfully submitted,

E. C. DAY,

JAMES A. WALSH,

Solicitors and of Counsel for Appellants.